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No. 85-1577

IN THE

Supreme Court of the United States

October Term, 1985

W. D. DINWIDDIE, JOE LEWIS
AND TOM KENNAN,
Petitioners,

vs.

THE BOARD OF COUNTY COMMISSIONERS
OF LEA COUNTY, W. H. BRININSTOOL, ERNEST
McNUTT, AND BILLY W. JOHNSON, COMMISSIONERS;
STERN BROTHERS AND COMPANY, AND PAT SNIPES,
COUNTY CLERK OF LEA COUNTY, NEW MEXICO,
Respondents.

RESPONDENTS' BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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4 2 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

OBJECTIONS TO THE INDEX 2

OBJECTIONS TO PETITIONERS' OPENING STATEMENT 3

OBJECTIONS TO STATEMENT OF JURISDICTION 3

OBJECTIONS TO PETITIONERS' STATEMENT OF THE CASE 4

OBJECTIONS TO PETITIONERS' REASONS FOR GRANTING THE WRIT. 7

1. Jurisdiction 7
2. No Substantial Federal Question Is Raised 10
3. Adequate Non-Federal Basis 24
4. Petitioners' Failure To Follow Court Rules. 25

CONCLUSION 27

APPENDICES:

APPENDIX A – Affidavit of County Clerk. 1a

APPENDIX B – Issues Raised by Petitioners in New Mexico Supreme Court 4a

APPENDIX C – Petitioners' Notice of Appeal 6a

APPENDIX D – New Mexico Election Contest Statutes 7a

TABLE OF AUTHORITIES

Page

CASES:

Ashcraft v. Estill County,
290 S.W.2d 31 (Ky. 1956) 14

Baker v. McCollan,
443 U.S. 137, 99 S.Ct. 2689,
61 L.Ed.2d 433 (1979) 10

Board of Education v. Citizen's Nat'l Bank,
23 N.M. 205, 167 P. 715 (1917) 14

Brian v. Barnett,
35 N.M. 207, 292 P. 611 (1930) 16

Briscoe v. Kusper,
435 F.2d 1046 (7th Cir. 1970) 22

Brown v. Ohio,
431 U.S. 161, 97 S.Ct. 2221 (1977) 10

Bullock v. Carter,
405 U.S. 134, 92 S.Ct. 949,
31 L.Ed.2d 92 (1972) 17

Carbajal v. Lucero – Trujillo v. Sandoval,
22 N.M. 30, 158 P. 1088 (1916) 16

Cardinale v. Louisiana,
394 U.S. 437, 89 S.Ct. 1161,
22 L.Ed.2d 398 (1969) 10

City of Albuquerque v. Water Supply Co.,
24 N.M. 368, 174 P. 217 (1918) 14

City of Mobile v. Bolden,
446 U.S. 55, 100 S.Ct. 1490,
64 L.Ed.2d 47 (1980) 8

D'Addario v. McNab,
32 N.Y.2d 84, 295 N.E.2d 792 (1973) 15, 21

Duncan v. Poythress,
657 F.2d 691 (5th Cir. 1981) 22

Ellis v. Dixon,
349 U.S. 458, 75 S.Ct. 850,
99 L.Ed.2d 1231 (1955) 10

Page

Gallegos v. Miera,
28 N.M. 565, 215 P. 968 (1923) 16

Gamza v. Aguirre,
619 F.2d 449, 66 A.L.R. Fed. 741
(5th Cir. 1980) 7, 9, 17, 20

Garner v. Louisiana,
368 U.S. 157, 169, 82 S.Ct. 248, 254
7. L.Ed.2d 207 (1961) 25

Gibson v. Firestone,
741 F.2d 1268 (11th Cir. 1984) 25

Glover v. Russell,
542 S.W.2d 751 (Ark. 1976). 22

Greater Beauxart Garden v. Cormier,
596 S.W.2d 597 (1980). 21

Griffin v. Burns,
570 F.2d 1065 (5th Cir. 1978) 17

Harper v. Va. Bd. of Elections,
383 U.S. 663, 86 S.Ct. 1079,
16 L.Ed.2d 169 (1966). 17

Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424, 83 S.Ct. 1759,
10 L.Ed.2d 983 (1963). 10

Hennings v. Grafton,
523 F.2d 861 (7th Cir. 1975) 21

Herb v. Pitcairn,
324 U.S. 117, 125-26, 65 S.Ct. 459,
463, 89 L.Ed. at 789 (1945). 25

Heth v. Armijo,
83 N.M. 498, 494 P.2d 160 (1972). 5

Hubbard v. Ammerman,
465 F.2d 1169 (5th Cir. 1972), *cert. denied,*
410 U.S. 910, 93 S.Ct. 967, 35 L.Ed.2d 272 (1973). 17, 21

Jackson v. Board of Commissioners,
122 Ohio St. 456, 172 N.E. 154 (1930) 14

Kremer v. Chemical Const. Corp.,
456 U.S. 461, 479, 102 S.Ct. 1883,
1896, 72 L.Ed.2d 262 (1982). 25

Page

Martinez v. Harris,
102 N.M. 2, 690 P.2d 445 (1984) 5, 11, 12, 13, 15

Minnesota v. Nat'l Tea Co.,
309 U.S. 553, 60 S.Ct. 676, 84 L.Ed. 460 (1940) 23

Montoya v. Ortiz,
24 N.M. 616, 175 P. 335 (1918) 16

Moore v. Kusper,
465 F.2d 256, 258 (7th Cir. 1972) 7

O'Brien v. Skinner,
414 U.S. 524, 94 S.Ct. 740, 38
L.Ed.2d 702 (1974) 10

Orchard v. Board of Commissioners of Sierra County, 42 N.M. 172, 76 P.2d 41, 51 (1938) 11, 16

Oregon v. Mitchell,
400 U.S. 112, 124; 91 S.Ct. 260, 265;
27 L.Ed.2d 272, 281 (1970) 10

Pettingill v. Putnam County R-1 School District, 472 F.2d 121 (8th Cir. 1973) 9, 21

Powell v. Power,
436 F.2d 84 (2d Cir. 1970) 9

Reese v. Dempsey,
48 N.M. 485, 153 P.2d 127 (1944) 16

Reynolds v. Sims,
377 U.S. 533, 554, 84 S.Ct. 1362,
1377-78, 12 L.Ed.2d 506 (1964) 8

Richmond County Business Ass'n v. Richmond County, 223 Ga. 337, 155 S.E.2d 395 (1967) 22

Roundebush v. Hartke,
405 U.S. 15, 92 S.Ct. 804, 31 L.Ed.2d 1 (1972) 19

Saxon v. Fielding,
614 F.2d 78 (5th Cir. 1980) 21

Smith v. Cherry,
489 F.2d 1098 (7th Cir. 1973) 22

Snowden v. Hughes,
321 U.S. 1, 8, 64 S.Ct. 397, 401,
88 L.Ed. 497 (1944) 9

Page

State v. Garcia,
77 N.M. 703, 427 P.2d 230, 232 (1967) 10

Tacon v. Arizona,
410 U.S. 351, 93 S.Ct. 998, 35
L.Ed.2d 346 (1973) 10

Toney v. White,
488 F.2d 310 (5th Cir. 1973) 19

Town of South Ottawa v. Perkins,
94 U.S. 260, 24 L.Ed. 154 (1877) 23

Ury v. Santee,
303 F.Supp. 119 (N.D. Ill. 1969) 23

Valdez v. Herrera,
48 N.M. 45, 145 P.2d 864, 869 (1944) 11, 16

Wainwright v. Good,
464 U.S. 78, 104 S.Ct. 378,
78 L.Ed.2d 187 (1983) 25

Wainwright v. Sykes,
433 U.S. 72, 81, 97 S.Ct. 2497,
2503, 53 L.Ed.2d 594 (1977) 25

Walker v. Mechem,
56 N.M. 529, 246 P.2d 201 (1952) 16

Welch v. McKenzie,
765 F.2d 1311 (5th Cir. 1985) 20

Weldon v. Sanders,
99 N.M. 160, 655 P.2d 1004 (1982) 16

Wiggins v. Lopez,
73 N.M. 224, 387 P.2d 330 (1963) 13, 14, 15, 21

Wright v. Closson,
29 N.M. 546, 224 P. 483 (1924) 16

FEDERAL STATUTES:

Voting Rights Act, Section 1983 8
42 U.S.C. Sec. 1302 ..... 4, 26

UNITED STATES SUPREME COURT RULES:

Page

Rule 10.2 25
Rule 17 26
Rule 20.6 26
Rule 21.2(c) 26
Rule 21.1(e) and (h) 26

NEW MEXICO STATUTES:

NMSA, 1978 Sections 1-3-5 and 1-3-8. 5
NMSA 1978, Section 1-14-1, et. seq.. 6
NMSA 1978, Sections 1-14-1 to 21 (Repl. 1985) 6
NMSA 1978, 1-1-1 to 1-20-22. 24
NMSA 1978, 1-14-3 6

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RESPONDENTS' BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

Respondents through their attorney, Mack Easley, object to certiorari being granted for the reasons that: This Court has no jurisdiction. There is no legitimate federal question involved. The case concerns the construction of a state statute regarding a county bond election in which no discrimination, illegal voting, fraud, false-dealing, inconvenience or harm to

any voter were alleged or proved. Petitioners have ignored the Rules of this Court and have attempted to mislead the Court on a number of issues. No United States Constitutional issue was raised, properly preserved or passed upon by the New Mexico Courts. The due process issue raised for the first time in the Petition is insignificant and does not meet the substantiality or "enormity" tests of the federal courts. The decision below was based on adequate non-federal grounds.

Respondents believe the Petition is frivolous and was filed for the purpose of delay.

In opposition to the granting of a Writ of Certiorari, Respondents urge the following points:

OBJECTIONS TO THE INDEX

In the Index under "Reasons for Granting the Writ", Petitioners start arguing their case on an erroneous basis by alluding to Petitioners' Fourteenth Amendment rights not to have their votes diluted by unqualified voters. The facts are that there is no allegation and not a single item of proof in the record that any unqualified voters cast ballots in the election. Respondent Snipes, the County Clerk, gave uncontradicted testimony that there were no illegal votes. Appendix A, Section 7. Furthermore, this issue was abandoned by Petitioners on the appeal to the New Mexico Supreme Court. Appendix B. This same issue is raised at three other places in the Petition, pages 3, 4 and 9, but is a completely bogus claim. Also, this issue is not an integral part of the "Question Presented" as framed on page i of the Petition and should be dismissed from consideration.

Under the same Index item, above, it is inherently misleading to claim that the New Mexico Court violated Petitioners' Fourteenth Amendment rights by its "failure" to void the election, without also advising that the issue was not presented,

properly preserved or passed upon by the New Mexico Courts, which facts are never mentioned at any place in the Petition.

OBJECTIONS TO PETITIONERS' OPENING STATEMENT

Petitioners erroneously alleged on page 2 of their Petition that there was a "total failure of State officials to comply with mandatory statutory requirements to publish notice of a pre-election consolidation of precincts." There was no such failure. The mandatory notice of consolidation was published, along with the notice of time and place for holding the election, in accordance with the statutes of New Mexico. Appendix A, Sec. 6. The real issue here is whether it was also mandatory that an additional notice be published and sent to the Secretary of State showing that a district judge authorized the consolidation because it was ordered by the Commissioners less than four months before the election.

Petitioners further alleged in the same paragraph that Respondent Commissioners violated Petitioners' substantive right to due process, but Petitioners concealed from this Court that it had not been previously raised.

Petitioners would further mislead this Court in the third paragraph on page 2 of the Petition into believing the New Mexico Supreme Court refused or failed to decide the issue involved in accordance with its own case precedent. Petitioners rely on two New Mexico cases, one of which is favorable to Respondents' view of the law and the second of which can be easily distinguished. On the other hand, there is a vast body of case law in support of Respondents' position.

OBJECTIONS TO STATEMENT OF JURISDICTION

From the filing of the Notice of Appeal by Petitioners in the New Mexcio Supreme Court down through the filing of

the Petition for Certiorari, Petitioners have urged on this Court a totally inapplicable statute for establishing jurisdiction in the United States Supreme Court. In the Notice of Appeal, Appendix C, in the Application for Extension of Time Within Which to Docket Appeal, paragraph 1, and in the Petition for Writ of Certiorari, page 2, Petitioners have persisted in alleging that the jurisdictional grounds upon which this review is sought is 42 U.S.C. Sec. 1302 which reads as follows:

> The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services, respectively, shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter.

It is quite obvious that this Section of the Social Security Act has no application whatsoever to the issues in the instant case. Respondents are still uninformed as to the statutory basis for this action. Petitioners' statement of jurisdiction is a nullity.

OBJECTIONS TO PETITIONERS' STATEMENT OF THE CASE

In the second paragraph in this section Petitioners allege as facts that persons were wrongfully registered and allowed to vote and that those votes "dramatically" affected the outcome of the election by "severely diluting" the votes of residents. None of these statements are true; they are pure fabrications.

Petitioners' original Petition For Declaratory Judgment makes no claims that any person was illegally registered or voted illegally or that such votes changed the outcome of the election. Furthermore, there was no allegation as to which

side won the election and what the vote tally was. A Motion to Dismiss was filed by Respondents in the trial court along with the affidavit of Respondent Snipes, who, as County Clerk, swore that there were no illegal votes cast. Appendix A, Sec. 7. Petitioners did not file any affidavits or present any contradictory testimony or documentary evidence of any kind although they were obligated to come forward with such evidence. No such evidence was ever presented.

Other pertinent facts that should be added to the statement of the case:

The trial judge awarded Summary Judgment in favor of Respondents after a hearing on the Motion to Dismiss. The Court held that the election contest laws required verification of the Petition, which had not been done; that Petitioners failed to allege that the challenged votes actually changed the result of the election as required by *Heth v. Armijo*, 83 N.M. 498, 494 P.2d 160 (1972); that the Petition failed to state a claim upon which relief could be granted; that NMSA 1978, Sections 1-3-5 and 1-3-8 NMSA relied upon by Petitioners here, were not applicable to this election; that the rationale of *Martinez v. Harris*, 102 N.M. 2, 690 P.2d 445 (1984) applied; that there was no allegation that the failure to comply with the particular statutes destroyed the integrity of the election; and that it was difficult to imagine how such compliance or non-compliance would have any effect on the election. The Petition was ordered dismissed. The Decision of the trial judge is set out in Petitioners' Supplemental Petition For A Writ.

Petitioners appealed to the New Mexico Supreme Court, raising only two points:

POINT I:. . . . . .

> The Trial Court erred in holding that the Board of County Commissioners need not comply with the provisions of Sections 1-3-5 and 1-3-8, NMSA (1978) in consolidating precincts for a special bond election.

POINT II: . . . . . .

> The Trial Court erred in holding that Plaintiffs' Complaint, and the suit represented herein, is subject to the provisions of Section 1-14-1, et. seq., NMSA (1978) pertaining to the election contest for public office.

Appendix B. Point I deals with Statutes that are set out in their entirety on page 5 of the Petition. They state that consolidation of precincts less than four months prior to an election shall be done only by order of the District Court, with notice of such action being sent to the Secretary of State and published once in a newspaper. Point II questions whether the election contest laws apply to bond elections.

It must be fully understood that the notice of the time and place for the election, and the designation of the consolidated polling places was published by the County Clerk in accordance with the Statutes and the requirements of the Board of Elections' office of the Secretary of State. Appendix A, Sec. 6. In addition, notices were published in each of the five daily and weekly newspapers within the County several times. However, it is admitted that no publication was made which stated that the District Court had approved the consolidation of the voting places and such a notice was not provided to the Secretary of State.

The New Mexico Supreme Court upheld the dismissal of the case based upon its decision on only one issue, that the statutory provisions, NMSA 1978, Sections 1-14-1 to 21 (Repl. 1985) and in particular Section 1-14-3, requiring that a petition in an election contest be verified, applied in this case, and that the Petition was dismissed for failure to so verify. The Court found this one issue to be dispositive and did not address the others raised. Opinion, Appendix A to the Petition.

OBJECTIONS TO PETITIONERS' REASONS FOR GRANTING THE WRIT

Respondents object on the following grounds:

1. Jurisdiction

Merely mentioning the words "due process" should not win Petitioners a trip to the United States Supreme Court. The bare necessities call for demonstrating real harm to real people caused by egregious conduct. The elements are missing here.

Petitioners must allege more than the mere failure of state officials to follow state law. They must allege violations of some federally protected or constitutionally guaranteed right the violation of which would subvert election procedures or cause the election to be unfair. *Moore v. Kusper*, 465 F.2d 256, 258 (7th Cir. 1972).

The "Question Presented", page i of the Petition, refers only to the issue of whether taxation through county bonds is prohibited because of the alleged voidness of the election. That statement is the last time the issue is mentioned in the Petition. There is no authority presented and no argument made regarding taxes paid because of issuance of the bonds. Furthermore, although Petitioners alleged in their original complaint that they were taxpayers, no evidence to that effect was entered in the record.

The other allegations and authorities cited in the Petition regarding alleged due process violations are concerned with "dilution" of votes, which claims are also specious.

In the case of *Gamza v. Aguirre*, 619 F.2d 449, 66 A.L.R. Fed. 741 (5th Cir. 1980) the Fifth Circuit denied jurisdiction in a case that has a much worse set of facts than are present in our case. In an El Paso, Texas School Board race, two candidates were in a run-off primary, but in some of the precincts

all five names of the candidates from the first primary showed up on the ballots. The irregularities arose because of errors in the management and programming of the voting machines and the ballots. Aguirre was declared to be the winner, but Gamza, upon learning of the irregularities, filed a section 1983 claim to void the election. The ballots had been impounded by District Court order, but most of them were destroyed in violation of the Order. Under certain facts it was assumed that Gamza might have won the race but for the errors.

The Court called attention to *Reynolds v. Sims*, 377 U.S. 533, 554, 84 S.Ct. 1362, 1377-78, 12 L.Ed.2d 506 (1964) for the quotation: "Undeniably the Constitution of the United States protects the rights of all qualified citizens to vote, in state as well as federal elections." However, the Court also pointed out that *Reynolds v. Sims* said that this is not an absolute and is properly limited by the fact that the political and federal framework leaves the conduct of state elections to the states, and that the right must be understood as a narrow substantive right, conferred by the equal protection clause, citing *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). The Court stated:

> We must, therefore, recognize a distinction between state laws and patterns of state action that systematically deny equality in voting, and episodic events that, despite non-discriminatory laws, may result in the dilution of an individual's vote. Unlike systematically discriminatory laws, isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause. *See, e.g., Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970). The unlawful administration by state officers of a non-discriminatory state law, "resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element

> of intentional or purposeful discrimination." *Snowden v. Hughes,* 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497 (1944).
>
> . . . If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute, and the elaborate state election contest procedures, designed to assure speedy and orderly disposition of the multitudinous questions that may arise in the electoral process, would be superseded by a section 1983 gloss.

Gamza, Id. at 453.

In *Gamza,* as in our case, there was neither a charge nor evidence that the electoral laws of Texas unconstitutionally diluted the vote of Gamza's supporters or that the laws operated in a discrimnatory manner. The Court held that in the absence of evidence that the alleged maladministration of the election procedures was attended by the intention to discriminate against the affected voters or was motivated by a desire to subvert the right of the voters to choose their school board representatives, the court could not conclude that there was constitutional error.

In our case there is no proof of intention to discriminate against these Petitioners or that the respondents were motivated by a desire to subvert the right of the voters. In addition, there are no justiciable claims of denial of the right to vote, of fraudulent interference with a free election or of other unlawful conduct which impacted on any individual's right to vote. Petitioners are simply attempting to persuade this Court to tinker with New Mexico's election machinery and to oversee the administrative details of a local election. This Court should refuse the offer. *Pettengill v. Putnam County R-1 School District,* 472 F.2d 121 (8th Cir. 1973); *Powell v. Power,* 436 F.2d 84 (2d Cir. 1970).

The sole federal question raised by this Petition was not raised, preserved or passed on in the New Mexico courts. This Court will not decide federal questions raised here for the first time. *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 83 S.Ct. 1759 10 L.Ed.2d 983 (1963).

Mr. Justice White, in *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969), explained the rationale behind this principle, cited the controlling cases, and stated that the state courts should be given the opportunity to decide the constitutional issues. *Oregon v. Mitchell*, 400 U.S. 112, 124; 91 S.Ct. 260, 265; 27 L.Ed.2d 272, 281 (1970); *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). *Tacon v. Arizona*, 410 U.S. 351, 93 S.Ct. 998, 35 L.Ed.2d 346 (1973); *Ellis v. Dixon*, 349 U.S. 458, 75 S.Ct. 850, 99 L.Ed. 1231 (1955); *Brown v. Ohio*, 431 U.S. 161, 97 S.Ct. 2221 (1977); *O'Brien v. Skinner*, 414 U.S. 524, 94 S.Ct. 740, 38 L.Ed.2d 702 (1974).

This Court should deny jurisdiction.

2. No Substantial Federal Question Is Raised

In the alternative, Respondents allege that there is no substantial federal question raised by the very tardy assertion of Petitioners that Fourteenth Amendment due process issues are involved.

In the third paragraph of the Petition and at other points in that document, Appellants claim that the election here was void, *ab initio*. There is no statute in New Mexico stating that a special bond election is void under these circumstances.

The New Mexico Supreme Court is not prone to give the term "void" a strict and absolute connotation. *State v. Garcia*, 77 N.M. 703, 427 P.2d 230, 232 (1967). Furthermore, the court has ruled that in the absence of a statute requiring that the election be invalidated, the courts will not take such action

if it is possible to prevent it, even if election officers have committed fraud. *Orchard v. Board of Commissioners of Sierra County*, 42 N.M. 172, 76 P.2d 41, 51 (1938). The Court has also ruled that mere irregularities in the conduct of an election will not render it void in face of the competing but controlling mandate that the legal voters are entitled to have their votes count. *Valdez v. Herrera*, 48 N.M. 45, 145 P.2d 864, 869 (1944).

In the 1984 *Martinez* case, *supra*, the Court ruled that no construction will be indulged which will defeat the elective franchise of a citizen "unless the strict letter of the law so requires." In this case there is no law the strict letter of which so requires.

The enormity of the actions of Respondents about which Petitioners complain must be considered in light of the facts that a fair-and-square election was held, which they lost, in which nothing impugned the integrity of the process, in which no person suffered any inconvenience, discrimination or harm, and after which no influence was shown on the outcome of the election. The County Commissioners simply did not consolidate the polling places four months in advance of the election and did not obtain an order of the District Court authorizing the consolidation, publish the same and mail it to the Secretary of State.

This is a common, garden-variety of election complaint that does not rise to constitutional proportions. It is an insignificant deviation from the procedures which had no effect on the rights of voters and poses no threat to constitutional guarantees.

For decades New Mexico's Supreme Court has been turning out opinions which directly bear on the issues here. The latest case of *Martinez, supra*, is controlling on the issue as to whether it is fatal to an election to fail to give a proper notice of the change of voting places and a failure to locate the polling

places within the boundaries of the regular precincts. The court ruled that such defects did not void an election and stated:

> The irregularities and mistakes caused by election officials will not deprive voters of their rights to participate in an election "absent bad faith, fraud or reasonable opportunity for fraud," or if it is possible to prevent disfranchisement. *Valdez v. Herrera, supra.*

Id. at P.2d 445.

The record in this case reflects that Petitioners did not allege or prove bad faith, fraud or reasonable opportunity for fraud. They did not allege that any irregularities of which they complained changed the result of the election.

The *Martinez* decision held that an election, in which the statutes were not strictly followed to consolidate the voting places, was not void for the reason that voters voted in a consolidated polling place located in another precinct in which they were not registered. If such voting across precinct lines does not void an election, why should it nullify an election if an order of a District Judge authorizing consolidation of precincts is not published and sent to the Secretary of State, especially where there is no allegation or proof that the integrity of the election has been impaired?

Martinez also addressed a New Mexico constitutional provision involving the creation of voting precincts and stated:

> We will not read a constitutional provision in such a way that might, in certain circumstances, deny eligible voters their right to vote *in* their precincts only because the ballot box or voting machine *has been placed outside* their precincts' boundaries. Any earlier cases holding otherwise are expressly overruled and shall not govern when there is no evidence that the integrity of the

> electoral process has been destroyed or even threatened by the physical location of the polling place. (Emphasis by the Court).

Id. at P.2d 449.

All the cases cited in support of Petitioners' claim that the election was void, *ab initio*, on grounds related to electors voting at consolidated polling places predate *Martinez* and are effectively overruled by the latter case.

The New Mexico Supreme Court had before it in the *Martinez* case the basic question as to whether the failure to abide by the strict letter of the Election Code in each case calls for invalidation of the election in one or more precincts. The Court did not equivocate in answering the question when considering the "highest rights of a citizen" and held that "unless the strict letter of the law so requires", it will indulge no construction that "will defeat unduly restrict, or obstruct the free exercise" of the right to vote of those persons who have legally voted. There is no statute in New Mexico that says an election is void under the facts in the present case.

Petitioners rely unduly on *Wiggins v. Lopez*, 73 N.M. 224, 387 P.2d 330 (1963) which held invalid a school bond election because of failure to publish notice of the time and place of the election in accordance with the statute. There are a number of distinguishing facts between that case and ours. Furthermore, the New Mexico courts have historically approached election contests on a case by case basis.

The most significant distinction is that the notice involved in *Wiggins* was concerned with the more important and basic notice of the time and place for the holding of the election, rather than a simple notification, as here, that a district judge had agreed to consolidation of polling places. The form of the notice was prescribed by statute in *Wiggins*. However, no legal notice was published at all; rather the school board furnished

a news story to the paper which was published. The Supreme Court in *Wiggins* supplied the controlling distinction that we urge on this Court when it stated:

> The question in the instant case is not that of an irregularity in the notice so as to apply the doctrine of substantial compliance, but *a question of no compliance at all* with the statute in respect to the requirement of notice by publication in a newspaper. (Emphasis added).

Id. at P.2d 333.

This language was quoted by the Court directly from *Jackson v. Board of Commissioners,* 122 Ohio St. 456, 172 N.E. 154 (1930). Also in *Wiggins,* although the Court held that it was mandatory that the official notice of time and place of the election be published, the Court stated:

> By this holding, we are not overruling our previous decisions wherein we held certain notice statutes to be directory.

Id. at P.2d 335.

The Court cited a number of cases, which definitely establish precedent that errors such as are involved in this case should not void an otherwise valid election. *City of Albuquerque v. Water Supply Co.,* 24 N.M. 368, 174 P. 217 (1918); *Board of Education v. Citizens Nat'l Bank,* 23 N.M. 205, 167 P. 715 (1917).

It is significant that the Court in *Wiggins* also relied on a Kentucky case, *Ashcraft v. Estill County,* 290 S.W.2d 31 (Ky. 1956) in which that Court invalidated an election because of failure to publish an "official notice." Our Court quoted favorably from the *Ashcraft* decision, saying that it is mandatory to publish and post the notice of the holding of an election, "but the provisions therein concerning the time and manner of such publication and posting are directory only,

and a substantial compliance therewith is sufficient." *Id.* at 335.

Thus, *Wiggins* says:

> Our position is much like that of the Kentucky Court in construing a notice statute for a special election.

Id. at P.2d 335.

In short, the case forming the principal basis of Petitioners' claims in this Court does not support their theory that publication of notices as we have here, which are not "official" notices of the election, are also absolutely mandatory and must be made in strict conformity with the statutes.

If *Wiggins*, by any stretch of the imagination might have been authority for voiding our election, it has been effectively overruled by *Martinez, supra.*

Petitioners erroneously cite *D'Addario v. McNab,* 32 N.Y.2d 84, 295 N.E.2d 792 (1973) as supporting their position that publication of "notice of polling places for a special election" is not merely directory. The case is not in point, because there was no publication or posting at all, the same as in *Wiggins.*

However, the case strongly supports the distinction urged by Respondents between the two types of notice, demonstrating that the claims of Petitioners in our case have no rational basis. That court made "quite clear a vital distinction. Statutory requirements of notice by publication for *submission of propositions* are mandatory . . . On the other hand, all other requirements to make elections effective, convenient, or even just more efficient, are generally treated as directory only, with respect to which substantial equivalence will be acceptable. In short, publication and posting are definitive conditions precedent to a valid submission. They have been referred to as 'jurisdictional' acts vital to the inception of the

electoral process; the rest may be supplied by actual notice or with substantial equivalence." (Emphasis added). *Id.* at N.E.2d 793.

Since the early case of *Carbajal v. Lucero – Trujillo v. Sandoval,* 22 N.M. 30, 158 P. 1088 (1916) our Courts have subscribed to the view that statutes which affect the time and place of the election, and the legal qualifications of the electors, are generally of the substance of the election, while those touching the mere details of the election, are directory. *Gallegos v. Miera,* 28 N.M. 565, 215 P. 968 (1923); *Brian v. Barnett,* 35 N.M. 207, 292 P. 611 (1930).

Petitioners rely on *Weldon v. Sanders,* 99 N.M. 160, 655 P.2d 1004 (1982) in arguing that the statutory provisions with which we are concerned are mandatory. A close reading of the case shows that the irregularities complained of directly affected the counting of the votes and the actual outcome of the race for District Attorney.

In *Weldon* the County Canvassing Board was found by the Court to have committed error in canvassing directly from the actual write-in ballots as well as other actual ballots and after finding errors, correcting them without notifying the precinct board and the Secretary of State. The statutes involved specified that the duty of the County Canvassing Board is limited to examining only the "election returns", not the actual ballots, and to finding errors, not correcting them.

The New Mexico Supreme Court has been consistent in ruling that violation of directory statutes is not critical to the validity of an election. *Valdez v. Herrera, supra; Walker v. Mechem,* 56 N.M. 529, 246 P.2d 210 (1952); *Orchard v. Board of Commissioners, supra; Wright v. Closson,* 29 N.M. 546, 224 P. 483 (1924); *Carabajal v. Lucero, supra; Montoya v. Ortiz,* 24 N.M. 616, 175 P. 335 (1918); *Gallegos v. Miera, supra; Reese v. Dempsey,* 48 N.M. 485, 153 P.2d 127 (1944).

Thus, it is amply evident that Petitioners are in error in stating that our State Supreme Court departed from precedent in deciding this case.

In addition to *Gamza v. Aguirre, supra,* the Fifth Circuit case of *Griffin v. Burns,* 570 F.2d 1065 (5th Cir. 1978) contains a comprehensive analysis of prior federal cases dealing with setting guidelines for handling claims of election irregularities. In that case 10% of the voters in a democratic party primary for a vacant city council seat voted by absentee or shut-in ballots which were later determined to be allowable only in general elections. The Court held that the election process itself reached the point of patent and fundamental unfairness, which constituted a violation of the due process clause. Ruling out the absentee ballots changed the result of the election.

In considering the difficult question of whether a federal court should intervene to invalidate a local election, we quote generously from *Griffin* in which the Court stated:

> But even when dealing with overt racial discrimination, in violation of the fifteenth amendment, the Fifth Circuit termed the power "[d]rastic, if not staggering . . . and therefore a form of relief to be guardedly exercised." *Bell v. Southwell, supra* at 662. *Compare Hubbard v. Ammerman,* 465 F.2d 1169 (5th Cir. 1972), *cert. denied,* 410 U.S. 910, 93 S.Ct. 967, 35 L.Ed.2d 272 (1973).
>
> Federal court intervention into the state's conduct of elections for reasons other than racial discrimination has tended, for the most part, to be limited to striking down state laws or rules of general application which improperly restrict or constrict the franchise, *see, e.g., Bullock v. Carter,* 405 U.S. 134, 92 S.Ct. 949, 31 L.Ed.2d 92 (1972) (rejecting candidate filing fees); *Harper v. Va. Bd. of Elections,* 383 U.S.

663. 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (rejecting poll taxes); *Reynolds v. Sims, supra* (rejecting geographical restrictions); *Phoenix v. Kolodziejski, supra* (rejecting limitation of franchise to property holders).

* * * *

Circuit courts have uniformly declined to endorse action under Sec. 1983 with respect to garden variety election irregularities. In *Hennings v. Grafton,* 523 F.2d 861 (7th Cir. 1975), the Seventh Circuit refused to act in a case involving the malfunctioning of voting machines in an election for county office. It described the election errors as "at most irregularities caused by mechanical or human error and lacking in invidious or fraudulent intent." *Id.* at 864. Judge Tone made clear the panel's belief "that the Constitution protects the right of all qualified citizens to vote in state and federal elections and to have their votes counted without debasement or dilution." *Id.* at 863-64 (Citations omitted.) But he went on to distinguish the voting machine problems in that case from "wilful conduct which undermines the organic processes by which candidates are elected." *Id.* at 864. Only the latter, in the court's view, would give rise to a constitutional claim and action under Sec. 1983.

Judge Kaufman, writing for the Second Circuit, similarly denied relief to six voters who sought a federal remedy (under the Voting Rights Act of 1965 as well as Sec. 1983) after a close congressional primary where, by mistake, a number of non-party members were allowed to vote. *Powell v. Power,* 436 F.2d 84 (2d Cir. 1970). The plaintiffs had sought too late the existing state remedy for review of claimed irregularities of this nature. In rejecting their subsequent Sec. 1983 claim the court said,

> "[T]he due process clause and article I, section 2 [of the Constitution] offer no guarantee against errors in the administration of an election. New York Election Law Secs. 145, 330(2) provide a method for correcting such errors as are made, and the plaintiffs do not contest the fairness and adequacy of the remedy."

Id. at 88. Earlier in its decision, the court rejected plaintiffs' contention that the Voting Rights Act and Sec. 1983 "comprehensively protect their ballots against dilution by illegal voting whether or not the dilution was wilful or knowing." *Id.* at 86.

Even where racial discrimination is alleged, the circuit courts have deferred to ongoing state recount and review procedures where these appear to be adequate and the alleged misconduct is lacking in "enormity". *Hubbard v. Ammerman, supra* at 1177, 1181; *Toney v. White,* 488 F.2d 310 (5th Cir. 1973). This is because the Constitution confers upon the states the "power to control the disposition of contests over elections . . . state and local offices." *Hubbard v. Ammerman, supra* at 1176, *citing Roundebush v. Hartke,* 405 U.S. 15, 92 S.Ct. 804, 31 L.Ed.2d 1 (1972). The federal court is not equipped nor empowered to supervise the administration of a local election. If every election irregularity or contested vote involved a federal violation, the court would "be thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law." *Powell v. Power, supra,* 436 F.2d at 86; *see also Pettengill v. Putnam County,* 472 F.2d 121 (8th Cir. 1973).

> [7, 8] but while, as the foregoing authorities indicate, local election irregularities, including even claims of official misconduct, do not usually rise to the level of constitutional violations where adequate state corrective procedures exist, there remain some cases where a federal role is appropriate. The right to vote remains, at bottom, a federally protected right. If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under Sec. 1983 therefore in order. Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots; and the question of the availability of a fully adequate state corrective process is germaine.

Id. at 1076.

In *Welch v. McKenzie*, 765 F.2d 1311 (5th Cir. 1985), the Court referred to other cases that have distinguished "garden variety" election disputes, which do not rise to the level of constitutional deprivation, from suits "implicating the very integrity of the electoral process," the latter cases being constitutionally cognizable. The Court stated:

> Because we have upheld the district court's findings that no racially discriminatory purpose or effect was present here, we are left with an "ordinary dispute over the counting and marking of ballots," involving complaints about missing signatures, ballots that should have been mailed rather than hand-delivered, and six fraudulent votes. As Judge Rubin explained in *Gamza (v. Aguirre)*, such claims of infringement of voting rights are not actionable in federal court because of our federal system's recognition that states are primarily responsible for regulating their own elections.

Id. at 453-54. *Gamza v. Aguirre, supra.*

In *Saxon v. Fielding*, 614 F.2d 78 (5th Cir. 1980) the Court refused to annul a sheriff's election in which there were some technical irregularities, but the trial court had found that the election was fair and that no one had been prevented from voting as they desired. The trial court further found that there was an insufficient showing of irregular votes to prove the outcome would have been different had the election been error free. The court reiterated the principle that the circuit courts have clearly indicated an unwillingness to become embroiled in suits attacking state elections on the grounds of administrative or technical irregularities. *Hennings v. Grafton, supra,* (malfunctioning of electronic voting devices; errors and irregularities are inevitable, and no constitutional guaranty exists to remedy them); *Pettengill v. Putnam County R-1 School District, supra; Hubbard v. Ammerman, supra.*

It is difficult to find any support for petitioners' theories of this case by reading the cases cited by them beginning on page six of the Petition. *Greater Beauxart Garden v. Cormier,* 596 S.W.2d 597 (1980) is cited for the principle that a statute "requiring proper notice of polling places for a special election" is mandatory and not merely directory. The opinion was by the Court of Civil Appeals of Texas which held mandatory the Texas statute stating that all voters "shall vote in the election precinct in which they reside." The election in a public utility district was voided when the election was held outside the election precinct in which the voters resided. The case had nothing to do with "proper notice of polling places for a special election".

The New York Court of Appeals case of *D'Addario v. McNab,* 32 N.Y.2d 84, 295 N.E.2d 792 (1973) was much the same factually as our case of *Wiggins v. Lopez, supra,* in that it involved an absence of an attempt of any kind at posting or publication. Elsewhere in this brief are quotations which

establish the distinction made between publishing the notice of time and place of the election and errors such as the one which we address here. In *Richmond County Business Ass'n v. Richmond County*, 223 Ga. 337, 155 S.E.2d 395 (1967) the law called for the publication of a 30 day notice of election relative to annexing territory to the City of Augusta to be placed in the daily newspapers in Augusta. The notice was placed in one daily newspaper but not in the other. The Court voided the election. Thus, the case is not analogous with ours. In *Glover v. Russell*, 542 S.W.2d 751 (Ark. 1976), the Arkansas Supreme Court invalidated a local option petition for a wet-dry election because it was not filed more than 60 days before the election as required by law, and for the further reason that the Board of Elections' Commissioners did not intelligently and accurately set out the boundaries of a precinct in the manner required by the statute. The ruling was that the precinct was not a valid, legal and established precinct. None of these issues are involved in the case at hand.

No help is contained for Petitioners in *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981). The Governor appointed a person to fill a vacancy on the State Supreme Court in face of a statute which called for a special election to fill the vacancy. Not holding an election at all does not equate with the facts in our case. *Smith v. Cherry*, 489 F.2d 1098 (7th Cir. 1973) has little to offer here since it involved a conspiracy to elect a stand-in candidate in the primary for one party, who subsequently withdrew, permitting the party organization to appoint a candidate who won the election. The Court found that the federal district court should have permitted discovery before granting summary judgment and held that there was possibly a discrimnatory design in violation of the losing candidate's civil rights.

Briscoe v. Kusper, 435 F.2d 1046 (7th Cir. 1970) concerned a last-minute change by the City Board of Election

Commissioners in the practice of disallowing signatures on nominating petitions and on duplicate signatures, notice of which changes were not given to the candidates for office. A number of candidates were ruled off the ballot. The court held that the actions were violations of due process There is no reasonable analogy with our facts.

Petitioners must have had tongue-in-cheek when stating at page 7 that *Ury v. Santee*, 303 F.Supp. 119 (N.D. Ill. 1969) is the "most similar federal case." In that case, two months before the scheduled town election, the incumbent trustees quietly proposed and passed an ordinance, without any notice, reducing the number of voting precincts from 32 to 6. When election day arrived these precincts turned out to be entirely inadequate to the number of electors wishing to vote. Traffic jams ensued, people waited hours to reach the polls, some were forced to vote outside of voting booths, people in populous precincts could not vote, and hundreds of people were deprived of an opportunity to participate in the election. If *Ury* is Petititoners' "most similar" case to ours, there remains a rather dramatic distinction.

Petitioners also cited *Town of South Ottawa v. Perkins*, 94 U.S. 260, 24 L.Ed 154 (1877) for the principle that a statute authorizing the issuance of local bonds does not retroactively give validity to a void election. The case makes no such holding. The court held that the act of the legislature that had been printed in the statutes as a law, had not actually been passed by the legislature and had no force and effect. So, there was no statutory basis for issuance of the bonds.

Petitioners state that this court will require a state court of last resort to hear a case on the merit when that court's failure to do so denies substantive due process. *Minnesota v. Nat'l Tea Co.*, 309 U.S. 553, 60 S.Ct. 676, 84 L.Ed. 460 (1940) is cited to support that principle. However, the case does not so hold. The court held that it was uncertain whether the

Minnesota Supreme Court was proceeding on the basis of a state question or a federal question and remanded the cause to the Minnesota Court for further proceedings so that the federal question asserted to be present might be dissected out or the state and federal questions clearly separated.

Thus, it is readily apparent that neither the cases relied upon by Petitioners nor the other reported cases show a substantial federal question or that the enormity of the results from the actions of Respondents rise to constitutional proportions.

The courts have coined some very descriptive phrases, the full meanings of which are not left to the imagination, in describing the types of situations that will induce a federal court to intervene in such cases: debasement or dilution of the vote; wilful conduct which undermines the organic processes; patent and fundamental unfairness; going beyond the ordinary dispute over counting and marking ballots; broad-gaged unfairness which permeates the election and infects the results; severely impugning the integrity of an election; implicating the very integrity of the electoral process; and clearly debasing the rights of all voters. Petitioners' claims and the facts in this case do not appear substantial in light of these guidelines.

3. Adequate Non-Federal Basis

New Mexico has a comprehensive Election Code, NMSA 1978, 1-1-1 to 1-20-22, which contains adequate safeguards by which any voter may protect his rights, including the right to contest any election. *See* Appendix D for a listing from New Mexico Statutes, 1978, of statutes governing election contests.

The New Mexico Supreme Court's opinion, Appendix A to the Petition, points out that our courts have a longstanding rule that verification of the election contest petition is jurisdictional. That opinion also cites other authorities from

other states which almost universally hold to the same principle.

The only issue decided by the New Mexico Supreme Court was that the Petition contesting the election was a nullity and that Petitioners were not entitled to have their claims litigated because of failure to verify the original petition.

This is a classic example of a court of last resort in a state making a decision based on an unambiguous state law and supported by established case law. We call attention to the New Mexico cases cited elsewhere in this brief to show the extent to which state issues have been litigated. State court decisions resting on adequate and independent state grounds are not subject to federal review. *Herb v. Pitcairn,* 324 U.S. 117, 125-26, 65 S.Ct. 459, 463, 89 L.Ed. at 789 (1945); *see Wainwright v. Sykes,* 433 U.S. 72, 81, 97 S.Ct. 2497, 2503, 53 L.Ed.2d 594 (1977); *Gibson v. Firestone,* 741 F.2d 1268 (11th Cir. 1984).

The views of the State's highest court with respect to state law are binding on the federal courts. *Wainwright v. Good,* 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983); *Garner v. Louisiana,* 368 U.S. 157, 169, 82 S.Ct. 248, 254, 7 L.Ed.2d 207 (1961). Depriving state judgments of finality would violate basic tenants of comity and federalism. *Kremer v. Chemical Const. Corp.,* 456 U.S. 461, 479, 102 S.Ct. 1883, 8196, 72 L.Ed.2d 262 (1982).

4. Petitioners' Failure to Follow Court Rules

Petitioners' application for certiorari should be summarily denied because of serious disregard for the rules of this Court.

(a) The Notice of Appeal does not comply with Rule 10.2 of the United States Supreme Court Rules which requires that the Notice of Appeal specify the statute or statutes under which the appeal to the Supreme Court is taken. Appellants

erroneously referred to "42 U.S.C. Sec. 1302" as the statute upon which they relied to give this Court jurisdiction of the appeal.

(b) Petitioners' Application for Extension of Time To Docket the Appeal carried forward this erroneous jurisdictional citation as a basis for an extension of time within which to docket the case. Rule 20.6 calls for such an application for extension to comply with Rule 21.1(e) and (h). Those sections require identification of the federal statutes that confer jurisdiction on this Court and that information be supplied regarding when and where the issues in question were raised in the court below, "the method and manner of raising them, and the way in which they were passed upon by the court" and to show that the federal questions were "timely and properly raised so as to give this Court jurisdiction." Petitioners concealed the fact that no federal issue was raised below.

(c) The same false grounds to support jurisdiction were advanced in the Petition for a Writ of Certiorari on page 2 under "Jurisdiction" and the same cover-up was utilized as regards the failure to raise the due process issue at any prior stage. Rule 21.1(c), requiring a statement of the jurisdiction statute was violated as well as (h), as described above.

(d) Petitioners have abused the spirit of Rule 17 by bringing a frivolous action that is neither special or important as required by 21.1(c); and it neither involves a state court decision on an "important question of federal law which has not been, but should be settled by this Court" nor a state court decision on a "federal question in a way in conflict with applicable decisions of this Court."

CONCLUSION

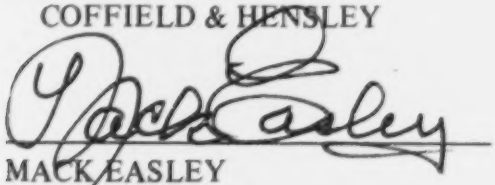
This Court should not grant the Writ of Certiorari because of jurisdictional reasons. An absolutely harmless error was committed by the County Commissioners. The events were episodic. The issues are academic.

This has all the characteristics of an "ordinary dispute over counting and marking", a garden-variety of election contest that should be handled at the state level and that does not command constitutional protection by this Court.

Respondents should recover their costs.

Respectfully submitted,

HINKLE, COX, EATON
COFFIELD & HENSLEY



MACK EASLEY
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(505) 982-4554
Counsel for Respondents

APPENDIX A

AFFIDAVIT

Filed
'84 Nov. 15
at 1:13

STATE OF NEW MEXICO)
) SS
COUNTY OF LEA)

I, PAT SNIPES, upon first being sworn upon my oath, state:

1). I am the County Clerk of Lea County, New Mexico. Among my official duties, as mandated by statute, is to determine the validity or invalidity of voter registration and to keep the official registered voter records for Lea County, New Mexico. It is also my official duty to prepare and conduct elections within Lea County.

2). In establishing the polling places for the special bond election, initially held on September 18, 1984, I examined prior special elections conducted in Lea County for the years 1970, 1971 and 1973. Each of the prior special elections in Lea County designated thirteen (13) polling places and used the same polling places that were used in 1984 with the exception of three ~~(3)~~ 4 designated polling places; Sanger Elementary School instead of Broadmoor School, Hobbs High School Auditorium instead of Taylor Elementary School, and Woolworth Community Library, Jal, New Mexico instead of Burk Junior High School or Administration Building as in the previous special elections. Attached hereto are exhibits "B-1", "B-2", "B-3", and "B-4" and "B-5" which are the official polling places as used in the 1970, 1973 and 1984 special election.

(PAS)

Tatum High School instead of Tatum Community Center PAS

3). I was advised on or about March 6, 1984 that the Lea County Board of Commissioners had approved a special bond

EXHIBIT "B"

election to be held sometime prior to the General Election in 1984.

4). I originally formulated the date September 11, 1984 and compiled the consolidated precincts as hereinabove stated and presented the same to the Board of County Commissioners on May 22, 1984.

5). The precincts which were consolidated into the various designated polling places are slightly different from those in 1970 and 1973 in that on January 29, 1974 precinct number sixty-three (63) (Buckeye) was consolidated with precinct fifteen (15) (High School Gym) by the Board of County Commissioners adopting Resolution number seventy-seven (77), a copy of which is attached hereto as exhibit "B-6". What was formerly precinct number twenty-two (22) in 1970 and 1973 was re-organized by the adoption of Resolution number fifty-four (54) dated November 17, 1981 which established a new precinct number twenty-six (26), a copy of Resolution number fifty-four (54) is attached hereto as exhibit "B-7".

6). All notices as to precinct polling places and precinct boundaries were published in accordance with the statute and the requirements of the Bureau of Elections office of the Secretary of State, Santa Fe, New Mexico. In addition to the requirements, these notices were published in each of the daily and weekly newspapers within Lea County.

7). No individual cast a vote who was not eligible to vote in the special election of September 18, 1984 who was not a registered voter in accordance with the statute and has stated in Resolutions number thirty-six (36) which has been attached to Mr. Leon Faris' Affidavit.

EXHIBIT "B"

8). The special bond election of September 18, 1984 was held at least forty-two (42) days prior to the general election as required by the law.

9). Following the special bond election the results were tabulated and subsequently canvassed by the Lea County Board of Commissioners and forwarded to the Bureau of Elections office of the Secretary of State, Santa Fe, New Mexico all as required by law.

10). I am the custodian of the official records of Lea County and the attached exhibits are true and accurate copies of the original official document as duly recorded.

11). In the special bond election of September 18, 1984, we had the highest voter turnout for a special election ever held in Lea County. More than forty percent (40%) of the registered voters exercised their franchise in this special election.

FURTHER AFFIANT SAITH NOT.

Dated this the 15th day of November, 1984.

s/ Pat Snipes
PAT SNIPES
County Clerk of Lea County

SUBSCRIBED AND SWORN TO before me this the 15th day of November, 1984.

s/ Linda Darnell
Notary Public

My Commission expires:

4-21-86

EXHIBIT "B"

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO	Filed May 2, 1985
W. D. DINWIDDIE, JOE LEWIS and TOM KENNAN, Plaintiffs-APPELLANTS, vs. THE BOARD OF COUNTY COMMISSIONERS OF LEA COUNTY, W. H. BRININSTOOL, ERNEST McNUTT, and BILLY W. JOHNSON, Commissioners; and PAT SNIPES, County Clerk of Lea County, New Mexico, Defendants-APPELLEES.	CASE NO. 15808

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY
Honorable William J. Schnedar, District Judge

APPELLANTS' BRIEF-IN-CHIEF

Wm. F. Brainerd
Attorney at Law
Post Office Box 1891
Roswell, New Mexico 88201
Phone: (505) 623-4134

INDEX

Page

TITLE PAGE

INDEX

TABLE OF AUTHORITIES . . . . . i, ii

STATEMENT OF THE CASE. 1

STATEMENT OF THE PROCEEDINGS. 2

POINT I 3

The Trial Court erred in holding that the Board of County Commissioners need not comply with the provisions of Sections 1-3-5 and 1-3-8, NMSA (1978) in consolidating precincts for a special bond election.

POINT II. 12

The Trial Court erred in holding that Plaintiffs' Complaint, and the suit represented herein, is subject to the provisions of Section 1-14-1, et. seq., NMSA (1978) pertaining to the election contest for public office.

SUMMARY. 17

APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

W. D. DINWIDDIE, JOE LEWIS and
TOM KENNAN,
Plaintiffs-Appellants,

vs. No. 15,808

THE BOARD OF COUNT COMMISSIONERS
OF LEA COUNTY, W.H. BRININSTOOL,
ERNEST McNUTT, and BILLY W. JOHNSON,
Commissioners; STERN BROTHERS AND
COMPANY, and PAT SNIPES, County Clerk
of Lea County, New Mexico,
Defendants-Appellees.

NOTICE OF APPEAL

COME NOW Plaintiffs-Appellants, W.D. DINWIDDIE, JOE LEWIS and TOM KENNAN, through their appellate counsel, William A. L'Esperance, and give notice of Appeal from the decision of the New Mexico Supreme Court in the above numbered and titled cause, filed November 12, 1985.

Appeal is taken to the United States Supreme Court pursuant to 42 U.S.C. Section 1302 and 28 U.S.C. Section 2101 (c).

RESPECTFULLY SUBMITTED:

s/ William A. L'Esperance

William A. L'Esperance
Counsellor at Law
609 Richmond, S.E.
Albuquerque, New Mexico 87106
(505) 266-8482

I hereby certify that I mailed a true copy of this notice to the District Court for Lea County and to Mack Easley, Esq. at PO Box 2129, Santa Fe, NM 87504 this 6th day of December, 1985,
s/ William A. L'Esperance

APPENDIX D

NEW MEXICO STATUTES, 1978, ANNOTATED
ARTICLE 14

Contests and Recounts

Sec.

1-14-1. Contest of elections; who may contest.
1-14-2. Contest of elections; status of person holding certificate.
1-14-3. Contest of election; filing of complaint.
1-14-4. Contest of election; judgment; effect; costs.
1-14-5. Contest of election; appeal.
1-14-6. Contest of election; preservation of ballots.
1-14-7. Contest of election; disqualification of trial judge.
1-14-8. Impounding ballots; ballots defined.
1-14-9. Impounding ballots; application for court order; deposit required.
1-14-10. Order of impoundment; contents.
1-14-11. Impoundment; subsequent orders; access; termination of order.
1-14-12. Disposition of deposit in impoundment proceedings.
1-14-13. Post-election duties; proof that no corruption occurred; rejection of ballots.
1-14-14. Recounts; rechecks; application.
1-14-15. Recounts; rechecks; cost of proceedings.
1-14-16. Recount or recheck proceedings; state.
1-14-17. Recount and recheck proceedings; county.
1-14-18. Recount; recheck; recanvass by canvassing boards.
1-14-19. Recount; recheck; candidate for district judge.
1-14-20. Recounts; rechecks; appointment of a special master.
1-14-21. Recounts; rechecks; mandamus.